No. 20,945

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

NEIFERT-WHITE CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The United States brought this action against appellee in the United States District Court for the District of Montana, under the civil provisions of the False Claims Act, 31 U.S.C. 231 (R. 2-15). After filing its answer (R. 20-26), appellee moved for judgment on the pleadings (R. 28). On December 6, 1965, the district court granted the dealer's motion and dismissed the Government's complaint (R. 38-45). On February 1, 1966, the Government filed a notice of appeal (R. 46). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

Under the Commodity Credit Corporation's Farm Storage Facility Loan Program,[1] any grain grower desiring to purchase grain storage bins could borrow from the CCC an amount not to exceed eighty (80) percent of the "actual out-of-pocket cost paid" for the storage bins. 23 F.R. 9686-87, as amended, 25 F.R. 1435. The grower was required to submit to the local county Agricultural Stabilization and Conservation (ASC) Committee, with his loan application, an invoice showing the actual cost of the storage bins and the amount of the down-payment thereon. 23 F.R. 9687, as amended, 25 F.R. 1435.

During a three month period in 1959, appellee Neifert-White Company of Townsend, Montana, sold a number of grain storage bins to twelve grain growers and, after each sale, assisted the purchaser in obtaining a loan from the CCC, under its Farm Storage Facility Loan Program, to finance the cost thereof (R. 2-15).[2] In rendering this assistance, an officer of the appellee prepared false invoices which showed that the purchase price of the bins sold to the growers to be greater than the actual purchase price (R. 2-15). These invoices were submitted, along with the growers' applications to the ASC

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[1] See 15 U.S.C. 714b(h).

[2] The relevant facts are derived from the pleadings, inasmuch as the case was disposed of on a motion for a judgment on the pleadings.

committee for Lewis and Clark County, Montana (R. 2-15). They were prepared for the purpose of fraudulently inducing the CCC to loan the growers sums of money in excess of that permitted under the agency's loan program (R. 2-15). On the basis of the false invoices, the CCC loaned money to the twelve grain growers in excess of 80 percent of the bins' actual purchase price (R. 2-15).

On February 2, 1965, the Government brought this action under the False Claims Act, seeking to recover statutory forfeitures totalling $24,000 from the Neifert-White Company on the ground that it had assisted a number of grain growers in presenting twelve false claims against the United States (R. 2-15). In its answer, the defendant-dealer asserted, inter alia, that the complaint failed to state a claim upon which relief could be granted (R. 20). Thereafter, appellee moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure (R. 28). On December 6, 1965, the district court (per Murray, J.) granted defendant's motion and dismissed the Government's complaint (R. 45). In its opinion filed on December 3, 1965, the court held that the applications for the CCC farm storage facility loans were not "claims" within the meaning of the False Claims Act because they "were not claims * * * for money to which the borrowers were asserting a right based on some liability of the government to the borrowers" (R. 41). In the court's view, "in order for

there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability to the claimant" (R. 41).[3/]

SPECIFICATION OF ERRORS

1. The district court erred in holding that the False Claims Act applies only to claims which are supported by an assertion of an enforceable legal right against the United States for the payment of money.

2. The district court erred in holding that successfully presented false applications for loans to purchase grain storage bins, under the Commodity Credit Corporation's loan program, are not claims within the meaning of the False Claims Act, 31 U.S.C. 231.

3. The district court erred in dismissing the complaint.

STATUTE INVOLVED

The False Claims Act, 31 U.S.C. 231, provides in pertinent part:

> Any person not in the military or naval forces of the United States * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of

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3/ The court's opinion is reported at 247 F. Supp. 878.

such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit, and such forfeiture and damages shall be sued for in the same suit.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT SUCCESSFULLY PRESENTED FALSE APPLICATIONS FOR COMMODITY CREDIT CORPORATION LOANS ARE OUTSIDE THE REACH OF THE CIVIL FALSE CLAIMS ACT.

Introduction

The single issue presented by this appeal is whether the False Claims Act applies to a false and fraudulent application for a loan from a Government agency, on the basis of which application there is an actual transfer of federal funds to which the applicant is not entitled.[4/] In holding that the Act does not apply in these circumstances, the district court relied exclusively on its belief that the civil liability provisions of the Act are restricted in their operation to claims which "constitute an enforceable demand for money on the Government based on [some] liability of the Government to the [claimant]"(R. 42). There was, of course, no legal obligation on the part of the United States to approve the grain growers' applications for loans.

[4/] It is evident from the district court's opinion that the court was of the view that, were these applications for loans
(footnote continued on next page)

In Point I below, we shall show that this restrictive interpretation of the Act plainly cannot be squared with the construction given the statute by the Supreme Court and the courts of appeals. In Point II, we shall demonstrate that successfully presented false applications for Government loans are "claims" within the meaning of the Act.

It should be noted preliminarily, however, that the district court's reading of the Act is not only contrary to settled authority but also, if accepted, would provide an open invitation to seek to obtain by deception public monies to which there is no entitlement. For, under the district court's view, not only is the False Claims Act unavailable as a deterrent to false applications for loans but, as well, it cannot be invoked as a sanction against those who employ deceit to obtain grants-in-aid or other forms of federal subsidies for which, under the governing statutory or regulatory provisions, they do not qualify. Obviously, with few (if any) exceptions no individual has any more of an enforceable right to a grant-in-aid from the Federal Government than he does to a loan of public monies. 5/

4/ (continued)
"claims" within the meaning of the False Claims Act, then appellee's conduct -- in assisting the grain dealers to obtain the loans by preparing false invoices which were submitted with the applications -- would be subject to the Act.

5/ An example of an outright subsidy program administered by the Department of Agriculture is the wool program, 7 U.S.C. 1781 et seq.

In view of the vast number of federal grant-in-aid programs and the large amounts of public monies which are annually disbursed under them, little elaboration is required as to the consequences -- in terms of the protection of the Federal purse -- of such an interpretation of the False Claims Act. But, quite apart from occasioning the frustration of the statutory purpose underlying the Act, the result of that interpretation is manifestly absurd. There is certainly no rational basis for concluding that, while the obtaining of $1,000 in federal funds on a fraudulent claim of entitlement to the money as a matter of contract right gives rise to False Claims Act liability, the obtaining of the same amount of public monies on an equivalent fraudulent claim of entitlement to them under a legislatively created subsidy program does not produce such liability. In both instances, the relevant considerations are identical: (1) there has been a receipt of federal monies by one who is not entitled to them; and (2) the transfer of the funds took place because of fraudulent representations made to the Government.

It need be added only that, analytically, there is equally no basis for a rational distinction for False Claims Act purposes between an application for a federal loan and an application for monies purportedly due the applicant as a matter of right. The purpose of a loan application, in common with a contractually-based claim, is to obtain the transfer of

federal funds to the applicant. And, while the expectation may be that the loan will be repaid, this does not mean that the applicant does not derive a direct monetary benefit from the receipt of the loan or that the United States does not incur a direct monetary disadvantage as a result of its disbursement. Leaving aside the always present contingency that the loan will not be repaid in full,[6/] under most (if not all) federal lending programs the rate of interest charged the borrower is less than that which the borrower would have to pay were the loan obtained on the same general terms and conditions from a commercial source.[7/] At least to the extent of the interest rate differential, the borrower receives a subsidy from the Federal Government. Indeed, it is doubtless the recognition of this fact that prompts most applications for loans under the lending programs authorized by Congress.

I.

A "claim" need not be supported by an assertion of an enforceable legal right to payment of money in order to be covered by the False Claims Act.

The False Claims Act imposes civil liability upon "[a]ny person who shall . . . present or cause to be presented,

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6/ Under some lending programs, an inability to obtain sufficient credit elsewhere at reasonable rates and terms is a statutory condition precedent to making the loan. See e.g., 7 U.S.C. 1941. Loans under such programs are thus essentially restricted to borrowers who are doubtful credit risks.

7/ See e.g., 7 U.S.C. 904, providing a 2% rate of interest on loans made by the Rural Electrification Administration to finance the construction of electric power generating and transmission facilities. And, as will be seen later, p. 24 , infra, the loans hereinvolved bore a lower interest rate than the prevailing market rate.

for payment or approval, to or by any [federal] officer . . . any claims upon or against the Government of the United States, . . . knowing such claim to be false or fraudulent or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes . . . any false bill . . . [or] claim . . . knowing the same to contain any fraudulent or fictitious statement or entry . . . ." 31 U.S.C. 231. As previously noted, the district court held that liability could not attach in this case because the False Claims Act covers only those claims against the government which are supported by an assertion of an enforceable legal right to the payment of money and, since there was no legal obligation on the part of the United States to approve the grain growers' applications for loans, such applications were not claims within the meaning of the Act. It is clear that this construction of the Act is contrary to the great weight of authority.

1. Insofar as we are aware, there is no prior decision of any court holding the False Claims Act inapplicable on the ground assigned by the district court here. In support of its restrictive reading of the Act, however, the court relied upon a dictum in United States v. Cohn, 270 U.S. 339, 345: "[T]he provision [in the False Claims Act] relating to the payment or approval of a 'claim upon or against the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government,

based upon the Government's own liability to the claimant."[8] For present purposes, there is no need to consider whether, in 1926 when Cohn was decided, that dictum would have been applied by the Supreme Court to hold the Act unavailable in circumstances where, as here but not Cohn, the defendant's fraud induced the Government to transfer federal monies to which the applicant was not entitled. While we think there is room for substantial doubt in that regard, it is enough to note that the Supreme Court's subsequent decision in United States ex rel Marcus v. Hess, 317 U.S. 537, precluded the district court's reliance on Cohn as a basis for holding that, to be within the Act, a claim must be founded on a legal obligation of the Government. It is not without significance, we think, that, while discussing several of the decisions upon which the Government relied, the court below totally ignored Hess.[9]

In Hess, several contractors had obtained, through collusive bidding, contracts with certain municipalities for the

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[8] The Cohn case involved a criminal prosecution for the submission of false statements in support of an application by an importer to remove certain non-dutiable imported merchandise from a United States customs house. The Supreme Court ruled for the defendant, stating that there had been no defrauding or cheating of the Government out of any of its property or money inasmuch as the merchandise involved was not dutiable. 270 U.S. at 346-347. Thus, the Court's statement, as to what is a "claim" for False Claims Act purposes, was entirely gratuitous.

[9] This Court recently referred to Hess as a "leading" False Claims Act case. Woodbury v. United States, 359 F. 2d 370.

construction of various public works. The contractors were paid, not by the United States, but by the local authorities out of funds partially supplied by the Federal Public Works Administration. The district court entered judgment against the contractors in the amount of $350,000 of which $203,000 was for double damages and $112,000 was for 56 violations of the False Claims Act. 41 F. Supp. 197. The Court of Appeals for the Third Circuit, reasoning that the Act was to be construed with "utmost strictness", reversed on the ground that there was no direct contractual relationship between the alleged claimants, the contractors, and the United States. 127 F. 2d 233. The Supreme Court, in reinstating the district court judgment against the contractors, specifically repudiated the Third Circuit's "interpretative approach." 317 U.S. at 540-541. The Court declared that the Act was intended "to reach any person who knowingly assisted in causing the government to pay claims grounded in fraud, without regard to whether that person had direct contractual relations with the government." 317 U.S. at 544-545.

Had the Supreme Court regarded the Act as requiring "an enforceable demand for money on the Government based on [some] liability of the Government to the borrowers" (R. 42), the government perforce would have been denied recovery in Hess This follows from the fact that the contractors' fraudulent claims -- held to be subject to the Act -- were not such enforceable demands. The Federal Government was under no

legal obligation to fund the program to which the fraudulent bids related; nor, indeed was it under any obligation to make the payments for work performed by the contractors.

While the court below also sought to derive support from United States v. McNinch, 356 U.S. 595 (R. 40, 43), the Supreme Court plainly did not there revive the requirement (if it ever existed) that the claim be "based upon the Government's own liability to the claimant." While referring in a footnote to the Cohn dictum (fn. 10, 356 U.S. at 600), the Court did not repudiate the Hess decision -- indeed, Hess was cited with approval. 356 U.S. at 598. In addition, the facts of McNinch were markedly different from those of this case and the rationale of the Court in holding the Act inapplicable has no present materiality.

The issue in McNinch was whether a private lending institution's application for credit insurance under a Federal Housing Administration program is a "claim" for False Claims Act purposes. Holding that it is not, the Court emphasized (356 U.S. at 598-599, emphasis supplied):

> In normal usage or understanding an application for credit insurance would hardly be thought of as a 'claim against the Government.' As the Court of Appeals for the Third Circuit said in this same context, 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' United States v. Tieger, 234 F. 2d 589, 591. In agreeing to insure a home improvement loan the FHA disburses no funds nor does it otherwise suffer immediate financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any. 10/

10/ Since there had been no default in McNinch, the Supreme Court expressly reserved decision "as to whether a lending
(footnote continued on next page)

In short, the critical consideration in McNinch was that a successful application for credit insurance (unlike a loan application) does not per se call for any disbursement of federal funds or impose any immediate financial detriment upon the United States. At no point in the McNinch opinion is there any reliance upon the fact that an applicant for such insurance does not have a legal right to have the application approved by the FHA (i.e., that the application is not based upon the Government's liability to the applicant). In these circumstances, we find it difficult to understand the suggestion of the court below (R. 43) that McNinch "is directly against the Government's position, and supports [the court's construction of the Act]".

2. Not only is the holding below respecting the ambit of the term "claim" irreconcilable with the Supreme Court's decision in Hess, it also conflicts with decisions of at least five different courts of appeals; the Third, Fourth, Fifth, Eighth and Tenth Circuits. And, while the court below pointed to this Court's decision in United States v. Howell, 318 F. 2d 162,

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10/ (footnote continued)
institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a 'claim' covered by the False Claims Act." Fn. 6, 356 U.S. at 599. Subsequently, in United States v. Veneziale, 268 F. 2d 504, the Third Circuit answered this question in the affirmative.

the fact situation there presented was quite different and the rationale of the decision does not reflect a disagreement between this Circuit and the other courts of appeals.

a. The most recent decision is that of the Third Circuit in United States v. Lagerbusch, No. 15,642, decided June 7, 1966.[11] This decision is of particular significance in view of the district court's reliance (R. 41) on United States v. Tieger, 234 F. 2d 589, as "being illustrative of the proposition that in order for there to be a claim within the meaning of the False Claims Act, the claim must be founded as of right upon the government's own liability ot the claimant." While Tieger, presenting the same question as McNinch, does not illustrate that proposition, in any event Lagerbusch shows that the Third Circuit does not subscribe to it.

The defendant in Lagerbusch made false representations to his employer, the Hercules Powder Company, on the basis of which he received "undeserved payments of money." Hercules was operating a Government installation under a cost-plus-a-fixed fee contract under which the government paid or reimbursed Hercules for all operating costs, including the sums fraudulently obtained from Hercules by the defendant. Appealing from a

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[11] A copy of this decision will be furnished appellee when this brief is served. We anticipate that, by the time of the oral argument, it will be reported and its citation will be made available to the Court.

judgment in the Government's favor under the False Claims Act, the defendant contended that the False Claims Act was inapplicable because the representations were made to, and the payments were received from, Hercules -- not the Government. Rejecting this contention, and holding the False Claims Act applicable, the Third Circuit relied, inter alia, on United States ex rel Marcus v. Hess, supra. It added that it was "not persuaded by the argument of the [defendant] that there is anything in the earlier decision in United States v. Cohn, 1926, 270 U.S. 339, which is inconsistent with our conclusion or with [Hess]." Since obviously Lagerbusch's false claims were not "based upon the Government's own liability" to him, the Third Circuit could not have more plainly expressed its view that the interpretation of the Act adopted by the court below is (1) not compelled by Cohn; and (2) inconsistent with Hess.

In United States v. Alperstein, 183 F. Supp. 548 (S.D. Fla), affirmed, 291 F. 2d 455 (C.A. 5), the question was whether the False Claims Act extends to an application by a veteran for admission to a Veterans Administration hospital for treatment of a non-service connected disability. While a veteran does not have a legally enforceable right to treatment for a non-service connected disability in a VA institution, he may be given such treatment on a space-available basis if he is financially unable to pay the necessary expenses of hospital care. 38 U.S.C. 610. Alperstein was determined to have falsely certified such inability in his application for admission.

Under the holding below, Alperstein's application was not a "claim" since he had no more right to be admitted to the VA.hospital than the grain growers here had a right to a loan. Nevertheless, the Fifth Circuit, agreeing with the district court ruling that the application was a "claim," upheld the imposition of False Claims Act liability. And, see also, Smith v. United States, 287 F. 2d 299, 304 (where the same circuit held that "the False Claims Act applies even where there is no direct liability running from the Government to the claimant" -- a holding directly contrary to the ruling below); and United States v. DeWitt, 265 F. 2d 393, 395 (in which the Fifth Circuit applied the Act where a gratuity was paid by the Veterans Administration in reliance on a false application for a government-insured loan).

It is true that, prior to Alperstein, the Tenth Circuit had held in United States v. Borth, 266 F. 2d 521, that an application for admission to a V.A. hospital is not subject to the False Claims Act. The basis of the Borth decision was not, however, the fact that the veteran did not assert an enforceable right to hospital treatment at federal expense. Rather, the Tenth Circuit reasoned that the Act applies only to claims for money or the transfer of property and that an application for admission to a hospital is a claim for services and not money or property. Although we think Borth was incorrectly decided, and that the Fifth Circuit properly refused

to follow it in Alperstein, the Tenth Circuit decision scarcely lends any support to the holding below here. Moreover, subsequent to Borth, the Tenth Circuit rejected the district court's interpretation. In Sell v. United States, 336 F. 2d 467, 473-475, it ruled that False Claims Act liability attaches to the submission of false applications by farmers for assistance (in the form of surplus grains) under the Commodity Credit Corporation's 1955 Emergency Grain Feed Program.[12/] This holding, too, would not have been possible had the Act been read as requiring that the claim "be founded as of right upon the Government's own liability to the claimant" (R. 41).

In United States v. Rainwater, 244 F. 2d 27, affirmed, 356 U.S. 590, the Act was applied by the Eighth Circuit to false applications submitted to the Commodity Credit Corporation for the purposes of obtaining loans on cotton. The district court here endeavored to dismiss Rainwater on the ground (R. 42) that "the only question presented and decided was whether a claim against Commodity Credit Corporation was a claim against the United States within the meaning of the False Claims Act." While this may have been true in the

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12/ Borth was distinguished on the ground that, unlike in that case, the purpose of the Sell claim was to obtain property. 336 F. 2d at 474.

Supreme Court, it was not so in the Eighth Circuit. As the court of appeals stated (244 F. 2d at 28), it had before it the additional question as to whether the "complaints state facts upon which relief may be granted where there has been no specific allegation of damage." And, in its discussion of that question, the court noted (ibid), inter alia, that the complaints set forth in detail "the manner in which the defendants procured the 'payment and allowance of false and fraudulent claims', (loans on cotton)". Thus, in the Eighth Circuit's view, there was no doubt that the term "claim" embraced the cotton loans made by CCC.

The Fourth Circuit's disagreement with the court below's reading of the Act is evidenced by United States v. Brown, 274 F. 2d 107. In that case, tobacco farmers filed false applications with a producer's cooperative for an advance of the support price of tobacco. These applications were held to be within the ambit of the False Claims Act even though not within the definition of "claim" adopted by the court below.

b. As above noted, the court below referred to this Court's decision in United States v. Howell, 318 F. 2d 162. That case involved false statements and records of gross receipts submitted by concessionaires of the San Francisco Bay Area Exchange, for the purpose of lessening the commission owed by them to the Exchange. This Court concluded that the statements were not claims for the purposes of the Act.

If this holding had rested upon the construction of the Act adopted by the court below, we would have had no hesitancy in asking the Court now to reconsider it. The fact is, however, that the Court neither was called upon to decide, nor did rule, that a "claim" must be based upon an enforceable demand against the United States.

What this Court found dispositive in Howell was that the defendants had made no fraudulent demand for money from the United States but, rather, had merely sought a reduction in the amount of money which they were to pay to the United States. 318 F. 2d at 165-166. In the Court's view, the Act was not intended to cover the situation where the claimant fraudulently seeks a "reduction" in the amount which he is to pay "to the Government." 318 F. 2d 166.

Whether that reading of the Act is right or wrong, it clearly has no present relevance. In sharp contrast to Howell, this case involves a false application which was designed to effect, and did effect, the transfer of money from the United States to the applicant -- not a reduction in a monetary obligation running to the United States. The distinction was recognized by this Court in Howell itself. Noting the Government's reliance upon the Fifth Circuit's decision in Smith v. United States, supra, the Court stated (318 F. 2d 166):

> We do not think that case differs in substance from the view we take and we are certainly in accord with the conclusion reached therein.

"The false claim resulted, as Smith knew it would, in the actual payment of Federal funds. That is sufficient." 287 F. 2d at 304.

In these circumstances, the reliance in Howell on the Cohn dictum (318 F. 2d at 164-5) gives no support to appellee's position. What this Court necessarily relied on Cohn for was simply the proposition that the "claim" must seek money or property from the United States. It may well be that Cohn provides support for that proposition. But, we stress again, where, as here, the claim does seek federal money or property, Cohn cannot be used to make the applicability of the False Claims Act turn on whether the claim is founded on a legally enforceable governmental liability. As five courts of appeals have expressly or implicitly recognized, such use of Cohn is precluded by United States ex rel Marcus v. Hess.

II.

Fraudulently induced Farm Storage Facility Program loans are covered by the Act.

We have shown to this point that the district court's interpretation of the scope of the False Claims Act must be rejected. We now show that, properly interpreted, the Act plainly embraces the loan applications hereinvolved.

1. As is reflected by the decisions discussed in Point I, the Act encompasses, at the very least, fraudulent submissions which seek the disbursement of federal funds or

the transfer of federal property. This is most certainly the thrust of McNinch: once again, the reason that the application for credit insurance was held to be outside the ambit of the Act was that the granting of the application did not occasion any immediate financial detriment to the United States since no federal monies or property were disbursed or transferred. Cf. United States v. Veneziale, supra. Similarly, in Cohn itself, the Act was held inapplicable because the false representations could have had no effect upon the federal purse. Where, in contrast to the circumstances of McNinch and Cohn, the fraudulent submission has had as its object the disbursement of federal funds or the transfer of government property, the Act has been held applicable.

In this connection, it has made no difference whether the false representations have been made directly to the United States or, as in Hess, Lagerbusch, and Brown, supra, to a third party: of controlling significance has been the involvement of federal funds or property and not the person to whom the false statement is submitted. Likewise, the courts have attached no significance to the label placed on the document containing the false statement. The "applications" in Sell, Brown and Alperstein were just as much within the coverage of the Act as if they had been denominated "claims," "vouchers" or "demands": on this aspect, as well, the critical consideration being the involvement of federal funds or property and not the caption on the document.

2. Measured by this firmly established standard, we think it beyond question that an application for a federal loan under a CCC lending program authorized by Congress -- no less than an application for feed grain under a CCC Emergency Feed Program (Sell) or an application for medical care in a V.A. hospital (Alperstein) -- comes within the Act. Its objective is the disbursement of federal funds and, when favorably acted upon by CCC, those funds are disbursed. Moreover, as previously noted, that loans (as distinguished from gratuities) are subject to repayment does not mean either that the recepient derives no benefit or that the United States suffers no financial detriment from the disbursement of the loan proceeds.

The Farm Storage Facility Loan Program was established by the Commodity Credit Corporation pursuant to a mandate from Congress. In the Act of June 7, 1949, 63 Stat. 154, 156, Congress amended the Commodity Credit Corporation Charter Act, 62 Stat. 1070, and directed the CCC to "make loans to grain growers . . . when such growers . . . apply to the Corporation for financing the construction or purchase of suitable storage [facilities]." 15 U.S.C. 714b(h). Prior to this time, there had been a shortage of adequate storage facilities and, since commodities had to be properly stored "before [producers could] . . . obtain the benefits of the price-support program with respect to their crops," many farmers were unable to avail themselves of these

benefits. H. Rept. No. 418, 81st Cong., 1st Sess., p. 5. Farmers could not, for example, obtain loans from the CCC on their grain or cotton crop unless the commodity was stored in suitable facilities. 95 Cong. Rec. 4938. Congress intended, by enacting this amendment,[13/] to assist the farmer in solving his storage problems and thereby "make the benefits of the price-support program fully available to farmers." H. Rept. No. 418, 81st Cong., 1st Sess., p. 6.

Consistent with the congressional directive to assist farmers in establishing storage facilities on their land, a program was established whereby grain growers could borrow money from the CCC in order to purchase or construct storage facilities. The regulations, in effect at the time of the making of the loans involved herein, provided, inter alia, that any grain grower needing storage facilities could borrow an amount not to "exceed eighty percent of the actual out-of-pocket cost paid by the borrower" for each facility (Sec. 474.726(b), 25 F.R. 1435); that the "principal of the loan . . .[was] repayable in equal annual installments with interest at four percent per annum on the unpaid balance" (Sec. 474.726(c),

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13/ In addition to directing the CCC to make loans to grain growers needing storage facilities, Congress gave the Corporation authority to acquire real property for the purpose of providing storage facilities. H. Conf. Rept. No. 723, 81st Cong., 1st Sess.

23 F.R. 9688); and that the "maximum term of the loan [was] . . . four years, except that the term of an individual loan . . .[could] be extended and re-extended . . ." (Sec. 474.726(a), 23 F.R. 9687).

The twelve grain growers evidently needed storage facilities on their farms, otherwise under the then existing regulation (Sec. 474.725(b)(4), 23 F.R. 9687) their loan applications would not have been approved by the ASC committee for Lewis and Clark County, Montana (R.2-14). Had the growers elected to finance their purchases of storage bins through conventional lending institutions, rather than the CCC, during the months of July, August and September 1959, the interest on their loans would have been substantially higher than the rate charged by the CCC. Federal Reserve Bulletin, (January 1960), p. 49. Moreover, had they obtained loans through conventional financing, the other terms and conditions of such loans would, undoubtedly, have been less favorable than those offered by CCC.

Thus, the grain growers plainly profited by the false applications and the United States was financially disadvantaged by reason of its reliance upon them. While perhaps not strictly relevant, it is very likely that appellee similarly benefited from its fraud. While its preparation, issuance and utilization of the false invoices may have been solely motivated by a desire to aid the grain growers, we think it

more likely that a principal objective was to facilitate its sales of the bins by making it possible for its customers to finance (by reason of the fraud practiced on CCC) a greater portion of the purchase price.

3. These considerations explain why the only other courts confronted with False Claims Act suits involving loan applications have held the Act to be applicable. United States v. Rainwater, supra; Toepleman v. United States, 263 F. 2d 697 (C.A. 4);[14] United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa).

And while the opinions in Rainwater and Toepleman may not have addressed themselves expressly to the question, the Cherokee Implement decision did. There, as here, an officer of the defendant-corporation had prepared and executed an invoice containing false statements, as a result of which the Commodity Credit Corporation loaned money in excess of the amount permitted under its program to finance the purchases of farm equipment. The district court held, in denying the corporation's motion to dismiss (216 F. Supp. at 375):

> The test as to whether a false claim is made against the United States is whether there is a demand for money or for some transfer of public property or disbursement of public funds.

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[14] The Toepleman case had previously been before the Supreme Court on the same issue as presented in Rainwater and was decided in the McNinch opinion, rendered the same day as Rainwater. 356 U.S. at 596.

> United States v. McNinch, 356 U.S. 595, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958 dicta). Where the United States actually makes a loan by reason of a false application, there may be a claim under the false claims statute. United States v. Rainwater, 244 F. 2d 27 (8th Cir.) affirmed 356 U.S. 590 * * * The cases since the McNinch decision have accepted this test. In United States v. Veneziale, 268 F. 2d 504 (3rd Cir., 1959), it was considered a false claim when the Government had to pay on a loan guaranteed. In all these cases where money was actually paid out in response to a false application for a loan, it was a claim within 31 U.S.C.A. §231, Smith v. United States, 287 F. 2d 299 (5th Cir., 1961); United States v. Brown, 274 F. 2d 107 (4th Cir. 1960); United States v. Globe Remodeling Co., Inc., D.C. 196 F. Supp. 652.

The court below acknowledged the Cherokee Implement decision, but brushed it aside (R. 44) as not "convincing" -- solely because none of the cases relied upon by the Iowa district court had involved a loan application except Rainwater (which the court had previously dismissed as not having decided the question). For reasons already developed, however, the decisions in cases such as Smith and Brown plainly lend direct support to the conclusion reached in Cherokee Implement. On the other hand, the court below was unable to point to any decision holding that loan applications are outside the False Claims Act. Nor could the court cite a single decision in which the term "claim" was held not to extend to an application for the disbursement of federal monies. We reiterate that every case cited by the court below in support of the result it reached --

i.e., Cohn, McNinch, Howell and Tieger -- involved situations in which the false representations had not had as their purpose or effect the receipt of public funds to which the claimant was not entitled.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded for trial.

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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